IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 469 of 1992

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT
and
Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

RAMESH @ RAGHU @ KANTILAL VESTABHAI PATEL

Versus

STATE OF GUJARAT

Appearance:
MR G RAMAKRISHNAN for Petitioner
MR MA BUKHARI APP for Respondent No. 1

CORAM : MISS JUSTICE R.M.DOSHIT
and
MR.JUSTICE A.L.DAVE
Date of decision: 23/11/2000

ORAL ORDER [Per : A.L Dave, J.]

This is an appeal preferred by a convict,

convicted by the Sessions Court at Navsari for Valsad for the offences punishable under Section 302 and 201 of IPC in Sessions Case No. 92 of 1990.

2. The facts of the case can be stated thus : An application was made to the Police Sub-Inspector, Pardi, District-Valsad by one Jamnaben Mohanbhai, resident of Fish Market, Pardi to the effect that she with her husband resides at the said address. She has a sister named Kamuben Vamanbhai who stays opposite her house. She has no issues. Their third sister Savita is married and stays at village Kolak. She has two sons and a daughter. The elder son Vijay was staying with Kamuben since he was aged one year. One the date of the application, the boy was aged 3 years.

3. It is stated in that application that an unknown person, who was drunk, came to the house of Kamuben Vamanbhai with a packet of roasted grams. Minor Vijay was playing on the Otta and said unknown person gave some grams to minor Vijay. After staying for a while, the unknown person went away. He again came to the house of Kamuben after sometime. At that time, Vijay was crying, and therefore, said unknown person enquired as to why the boy was crying and then offered to get a chocolate for the boy and took away the boy towards the market. After about 15 minutes time, Kamuben Vamanbhai approached the applicant Jamnaben and informed her that an unknown person has taken Vijay to the market under the pretext of getting him a chocolate and that they have yet not come back. Therefore, both the sisters started inquiring about the unknown person. It is stated that the unknown person had a bald head with small hair round the border of the head. He has an injury on the head which is stitched. On inquiring about the identity of such person from village people, on the basis of description, they learn that said person is Laxman Nanji Dubla of some village near Bhilal. Despite due search, they could not find out either Vijay or said Laxman Nanji, and therefore, the application was given to the police. In the said application, description of Vijay is given as a boy aged three years wearing red jersey and a short. This application was given to the Police Jamadar on 29th April, 1990. On basis of that application, an entry was made in the application register. Statements of several persons were recorded on 30th April, 1990. A complaint was given by Kamuben Vamanbhai on basis of which an offence was registered and the case was investigated upon. The Investigating Agency after collecting the evidence found that evidence was sufficient to connect the accused with the crime, and therefore, the

Investigating Officer made a report under Section 173 of Cr.P.C before the learned Judicial Magistrate, First Class, Pardi. As the case was triable exclusively by the Court of Sessions, the learned JMFC, Pardi committed the case to the Court of Sessions, Valsad at Navsari. The case was registered as Sessions Case No. 92 of 1990.

4. As the accused was not defended by an advocate, an advocate was appointed at the Government costs by the Sessions Judge by an order dated 4th January, 1992.

5. The charge against the accused was framed at Exh. 2 whereunder the accused was charged to have committed an offence under Section 364 of IPC on 29th April by removing minor Vijay from the lawful custody/guardianship of Kamuben Vamanbhai Patel and her husband Vamanbhai Patel. The accused was also charged to have committed an offence of murder, punishable under Section 302 of IPC, for the murder of minor Vijay between 11th May and 12th May, 1990 at village Nihali, Taluka Mahua, District Surat. The accused was further charged to have destroyed the evidence of the commission of aforesaid offences by him. The accused pleaded not guilty of the charge. The trial was, therefore, proceeded against the accused.

5.1 The learned Sessions Judge, after considering the evidence led by the prosecution, recorded the statement of the accused under Section 313 of Cr.P.C and considering the contentions raised by the parties, came to the conclusion that the prosecution had successfully proved the charge against the accused punishable under Section 364, 302 and 201 of IPC by his judgment dated 12th May, 1992. Learned Sessions Judge, after hearing the accused on sentence, directed the accused to undergo imprisonment for life for the murder of minor Vijay. He also imposed life imprisonment for offence punishable under Section 364 of IPC and a sentence of rigorous imprisonment of two years for the offence punishable under Section 201 of IPC. He directed all sentences to run concurrently.

6. Aggrieved by the said judgment and order, accused-convict has preferred this appeal. The appeal was preferred through jail. Learned advocate Mr. V.T Acharya was appointed by the Court to plead the case of the appellant. When the matter is called out, he is not present. However, Mr. G. Ramakrishnan, the learned advocate is appointed to assist the Court.

7. Mr. Ramakrishnan appearing for the appellant submitted that there is no direct evidence for the

offence of murder. The evidence relied upon by the Sessions Court for convicting the accused under Section 364 IPC is also scanty and unreliable. In fact, there is no evidence to connect the accused with the offence. He, therefore, submitted that the learned Sessions Judge has not properly evaluated the evidence while convicting the appellant and the appeal, therefore, may be allowed.

7.1 Mr. Ramakrishnan submitted that according to the prosecution case, Vijay was taken away by an unknown person. The description of the unknown person does not tally with the description of the accused. Except the identification by the witnesses in the Court, there is no other evidence to connect the accused with the offence. No test identification parade is carried out. Nor is there any other independent, cogent and reliable evidence to connect the accused with the offence of kidnapping of Vijay. Mr. Ramakrishnan has submitted that so far as murder is concerned, there is no evidence at all. Even if the prosecution evidence is accepted at its face value then also there is no evidence to indicate murder. On the contrary, witnesses have admitted that the child was well looked after by the accused. All the same, there is no evidence to show that the child which was with the accused, as noticed by those witnesses, was minor Vijay. Mr. Ramakrishnan has submitted that the evidence traced by the Investigating Agency at a later point of time in form of bones and a bed sheet do not inspire any confidence. The bed sheet with which the dead body is claimed to have been wrapped could not have remained there for two and a half months with no trace of the dead body on the bed sheet. The bed sheet also could not have remained there for such a long time. Mr. Ramakrishnan, therefore, submitted that the prosecution case is unbelievable. There are no connecting links between the offence and the accused-appellant, and therefore, the judgment and order recording conviction of the accused for the offence punishable under Section 302, 364 and 201 of IPC may be quashed and set-aside by allowing the appeal.

8. Learned APP Mr. Bukhari has resisted the appeal. According to him, there is sufficient evidence to connect the accused with the offence. He submitted that there is panchnama recorded under Section 27 of the Evidence Act where the accused has admitted his guilt and has discovered the place of offence as well as the place where the dead body was concealed. Mr. Bukhari submitted that evidence of Kamuben is sufficient to indicate that it was the accused who had taken away the child. The Court has before it this strong evidence of

last-seen-together alongwith the evidence of the employer of the accused who has also seen the accused with Vijay. No error can be said to have been committed by the learned Sessions Judge in convicting the accused. The appeal may, therefore, be dismissed and the judgment and order may be confirmed.

9. We have been taken through the entire record and proceedings by both the sides. We have carefully considered the contentions raised by both the sides. In our opinion, this appeal has merits for the reasons that would be recorded in the paragraphs to follow.

10. The incident occurred on 29th April, 1990. On that very day, an application was given by Jamnaben Vamanbhai Patel to the Police Sub-Inspector, Pardi. The application is produced at Exh. 20 through deposition of Jamnaben Vamanbhai Exh. 19. Jamnaben does not have any direct knowledge about the incident but she has derived knowledge through Kamuben. She states that Kamuben told her that an unknown person, who was drunk, took away minor Vijay under pretext of getting a chocolate to him. In the application, she has given description of that unknown person as a bald man with small hair round the border of his head with a sutured wound on his hand, who was identified by villagers as Laxman Nanji Dubla.

10.1 The accused came to be arrested on 8th June, 1990. A panchnama in this regard was drawn [Exh. 12] wherein description of the accused is given. His name is indicated as Ramesh @ Ravoo @ Kantilal Vestabhai Patel of Vapi. His person was closely examined and it is recorded that no marks of any injury were found. Not even the sutured wound on the hand.

11. Thus, if these two pieces of evidence are seen together, they indicate that the description as given in Exh. 20 [first ever material information regarding incident giving description of the kidnapper] does not tally with the description of the accused either in form of his name or his place of residence or his physical appearance.

11.1 It would not be out of place to record that the conduct of Kamuben, as emerging from Exh. 20 & Exh. 22 of the FIR and her evidence, in our opinion, is not natural. No lady would permit her child to be taken away by a stranger more so when he was found to be drunk, as is claimed by Kamuben. This conduct of her does not inspire any confidence.

12. It is also worth noting that Exh. 22 FIR which is given by Kamuben Vamanbhai Patel on 30th April, 1990 states that on giving description of the kidnapper, she was informed that the person is known as Ramesh @ Ishwar. The evidence of Kamuben and Jamnaben, therefore, go contrary to each other. Jamnaben does not say anything about the information received from others regarding the name of the kidnapper but she does give description of the kidnapper. She denies a suggestion in cross-examination that they have received information as to the name of the kidnapper as Laxman Nanji of some village near Bhilad, Jamnaben, therefore, deliberately omits to give information received by her and Kamuben while enquiring about kidnapper and Vijay, named the kidnapper as Laxman. By this omission, she tries to mould her deposition in a manner to help the prosecution case.

13. Jamnaben has stated in her deposition that when they went in search of minor Vijay, with a photograph, they met Nathu Magan who told them that he had seen Vijay and he told them that he can get the boy if they would spend Rs. 200/=. Nathubhai Maganbhai is not examined as a witness.

14. Prosecution has examined Savitaben Gajanand at Exh. 6. She does not have any first hand information regarding the incident. She only has a derived knowledge about the incident. She says that Kamuben has not given any identity of the kidnapper. No name was given, no description was given.

15. Witness Somabhai Naranbhai Exh. 7 is from village Nihali. He says that the police had come to him about a year and a half prior to the date of his deposition. That the accused, prior thereto, had come to him for work with a young boy aged about three years. He had come to him in the evening and was asked to do the work from the next day. The accused had given his name as Raghu Gamit of village Dharampur. He had disclosed that his wife had expired 15 days prior thereto and he has been driven out of the house by his brother. The witness says that the accused was permitted to stay with the boy in Kodhara. The accused worked from 8th May, 1990 upto 11th May, 1990 as a daily wager @ Rs. 15/= per day. On 12th May, 1990 at about 7.30 in the morning the accused came to him and told him that the young boy did not speak. The witness, therefore, went to Kodhara alongwith the accused. The boy was lying on the floor. He, therefore, called Manibhai Gigabhai and Kikabhai Naranbhai who found that the boy had expired. The

accused stated that the boy was running fever for about two days. The accused wanted to perform burial at that place only but the witness advised him to go to his home town as he has come there after a quarrel with his brother. He suggested that the burial may be performed at Dharampur. Witness states that he paid him Rs. 30/= in addition to Rs. 26/= for the bus-fare and sent him in the bus. The dead body was wrapped in a bed sheet given by the witness, which according to him, is the muddamal article no. 3. He says that his sister-in-law Gangaben had informed him that the accused use to beat the young boy. He states that when the accused came to him, he had a shaven head. According to the witness, the police came with the accused and went to Kokarwa Khadi. He also accompanied the team. The accused indicated the place wherefrom bones and a bed sheet was found alongwith a small banian/jersey. The witness has been cross examined at length. He admits that he has not brought the register whereunder name of the accused was entered. The accused use to take the boy with him when he went for work. He admits that accused used to look after the boy as if he was his son. He admits that the accused insisted for the burial of the boy at his place only.

15.1 Inspite of very close scrutiny, we are unable to find even an iota of evidence to indicate that the young boy in company of the accused about which this witness deposes was Vijay and none-else. Nor is there anything to indicate that the boy was murdered by the accused. Death of the young boy ipso facto cannot indicate that the boy was murdered by the accused and that the said boy was minor Vijay for whose murder, the accused has faced the trial. At this place, it would also be relevant to note the conduct of the accused. He comes and tells this witness about death of the boy. He proposes the burial there and on being advised, takes the dead body to Dharampur. This reflects a natural and innocent behaviour on part of the accused.

16. PW-3 Gajanand Mahadev Shinde Exh. 90, husband of Savitaben states that he does not have any personal knowledge about the incident. He had learnt about the incident of kidnapping through Kamuben. He admits that when he was sitting at the house of Kamuben, Police had come with a man who had kidnapped Vijay. He had seen that man, who is now accused before the Court. Identification by this witness for the first time in the Court, therefore, has poor significance.

16.1 This witness identifies the red colour jersey [muddamal Article no. 2] before the Court but in his

cross examination, he admits that there was no special identification mark on muddamal article no. 2 and as such, in absence of any such mark, mere identification of red colour jersey as a jersey worn by the child cannot advance the case of the prosecution any further. The panchnama drawn and produced on record at Exh. 15 does not inspire any confidence as it does not conform to the required standard of a panchnama under Section 27 of the Evidence Act. PW-Sureshbhai Khandubhai in Exh. 14 states that the accused was in police custody on 11th June, 1990 when he was summoned by the police as panch. Another panchwitness was Anilbhai Somabhai. He says that the accused had disclosed his name as Raghu, then he says that the preliminary panchnama was drawn whereunder he and the other panch witness had signed. He then says that the accused took them to Kodhar and thereafter to a banyan tree in the grazing field where a bed sheet and a piece of jersey and bones were found to be lying which were seized by the police, after drawing a panchnama. Thus, the ingredients of Section 27 of the Evidence Act are absent in this panchnama and the deposition of panch witness. Finding of a piece of red jersey will not establish the offence of the accused or his connection with the guilt in any manner.

17. Witness Vasantbhai Govindbhai is examined at Exh. 10. He is a panch witness to the arrest of the accused and the place of incident.

18. Kamuben Vamanbhai Patel is examined at Exh. 21. She reiterated what is stated by her in the FIR Exh. 22. She identifies the accused as a person who took away minor Vijay. During cross examination, she admits that at the time of incident, she did not know the name of the accused. She admits that she had been to the house of Babu Hari and inquired with Bai Keshiben whether Ramesh was available. She admits to have told that Ramesh may be loitering nearby. She also states that Keshiben told her that Ramesh and Vijay may be together. She admits that Ramesh and Sita were sitting at the house of Keshiben, and therefore, she had gone to Keshiben for a casual inquiry.

19. It requires to be noted that this witness has identified the accused for the first time in the Court. There is no test identification parade carried out by the Investigating Agency. No description of the culprit is given by this witness in the FIR. The description that is given in Exh. 20 does not tally with the description of the accused.

19.1 It would also be worthy to note that admittedly Kamuben did not know the name of the culprit yet she goes to Keshiben and enquires about Ramesh by name. She also admits that she has gone to Keshiben by way of casual inquiry. If Kamuben had gone to Keshiben for inquiring about Ramesh in a casual manner, her story of Vijay having been kidnapped by accused Ramesh gets falsified. It also affects her story that she did not know the name of the kidnapper.

20. Rest of the two witnesses namely Dhanraj Motiram and Ramjibhai Varvabhai are police witnesses. Dhanraj Motiram was the PSO who has recorded the FIR and has registered the offence.

21. Despite close scanning of the prosecution evidence, we are at loss to even identify any iota of evidence trust worthy enough to connect the accused with any of the offences that he is convicted for. In our view, therefore, the appeal deserves to be allowed. The evidence regarding kidnapping of minor Vijay by accused suffers from vital defects. The evidence of the only eye witness to the offence of kidnapping viz., Kamuben does not inspire confidence for the various defects in her deposition; as discussed above. There is no evidence to indicate that it was Vijay who was with Accused who ultimately had expired. We, therefore, allow this appeal.

22. Appeal is allowed. The judgment and order dated 12th May, 1992 passed by the learned Sessions Judge, Valsad at Navsari is hereby quashed and set-aside. The appellant is acquitted of the charges levelled against him. He be set at liberty forthwith, if not required in any other case. Muddamal be disposed of as directed by the Sessions Court.

[Ms.R.M Doshit, J.]

[A.L Dave, J.]

Prakash*